IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

TITAN INVESTMENT FUND II, LP	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 09C-10-259 WCC
	)	
FREEDOM MORTGAGE CORPORATION,	)	
	)	
	)	
Defendant.	)	

Defendant's Motion to Compel Submitted: November 30, 2010
Decided: February 2, 2011

Defendant's Motion for Summary Judgment Submitted: December 22, 2010
Decided: February 2, 2011

On Defendant's Motion to Compel - GRANTED
On Defendant's Motion for Summary Judgment - DENIED

OPINION

Collins J. Seitz, Jr., Esquire; David E. Ross, Esquire; Ryan P. Newell, Esquire; Connolly Bove Lodge & Hutz LLP, 1007 North Orange Street, P.O. Box 2207, Wilmington, DE 19899-2207. Attorneys for Plaintiff.

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CARPENTER, J.

In this breach of contract action, Defendant Freedom Mortgage Corporation ("Freedom" or "Defendant") has filed two motions now before the Court. The first is a Motion to Compel Production of Documents and Testimony Improperly Withheld as Privileged, alleging that Plaintiff Titan Investment Fund II, LP ("Titan" or "Plaintiff") has improperly claimed the attorney-client privilege for communications that were shared with third-party investors and their counsel. The Court was asked to decide whether the common interest doctrine extends the protection of the attorney-client privilege to parties engaged in a collaborative business venture where the parties have not joined together for an express legal purpose. The Court finds that Titan has failed to meet its burden in order to maintain the privilege and will grant Defendant's Motion to Compel.

In addition, Freedom has filed a Motion for Summary Judgment asserting that as a condition precedent to Freedom's obligation to close on the warehouse financing agreement, Titan first had to obtain written, binding investors commitments. Freedom asserts Titan did not met this commitment and therefore it is entitled to summary judgment dismissing the breach of contract claim. In response, Titan asserts that it was Freedom who abandoned the transaction because of changes in market conditions and this conduct was communicated to Titan before the deadline for meeting their commitment obligations. As such,

Titan argues a factual dispute remains regarding the circumstances surrounding the parties' failure to proceed with their agreement. The Court agrees that there remain disputed facts on this issue and will deny the summary judgment motion.

A. *The Underlying Transaction*

In early 2009, the principals of Titan began discussions with Freedom about securing funds for a $25 million funding warehouse which would allow Freedom to meet an increased demand for residential mortgage refinancing. The negotiations continued through the spring, resulting in a Term Sheet and Letter Agreement executed on April 9, 2009, which detailed the terms of the agreement. Under the terms of the Letter Agreement, Titan was required to secure written binding investor commitments totaling $25 million on or before July 24, 2009. If they were able to secure the commitments, Freedom was obligated to proceed under the agreement.

From April to June 2009, Titan was engaged in negotiations with investors to secure funding for the proposed warehouse facility to provide capital to Freedom. One of the potential sources of funding was an entity known as Context Capital Partners LP ("Context"). Titan sought to have Context provide $5 million towards its initial $25 million commitment to Freedom. The parties dispute the relationship between Titan and Context during this period. Titan claims that

Context was a 50 percent general partner in Titan and that all parties had "always contemplated" such an arrangement from the time of Titan's formation, even though there was no written partnership agreement between Titan and Context.[1] Titan asserts that it had intended to amend the limited partnership upon closing of the Freedom deal and that it entered into a sharing agreement with Context for the purposes of this litigation to reflect the intended structure of the Titan fund after the deal collapsed.[2] Freedom, on the other hand, contends that from April to September 2009, Titan and Context were negotiating over the terms pursuant to which Context would serve as the co-general partner of the Titan fund, including discussions over how Context and Titan would "split" the general partner's fees.[3]

Regardless of the nature of the business relationship between Titan and Context during the negotiation period, it is clear that Titan and Context shared a great deal of information between them while negotiating the terms of the deal and that all parties involved relied on the advice of legal counsel. Titan retained Herrick, Feinstein LLP ("Herrick") to provide advice on draft commitment letters, the draft repurchase agreement, and litigation strategy.[4] Context received advice from its own in-house counsel as well as its outside counsel, Morrison Cohen LLP

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[1] Pl.'s Opp. to Def.'s Mot. to Compel Production of Documents and Testimony 2.
[2] *Id.*
[3] Def.'s Mot. to Compel Production of Documents and Testimony Improperly Withheld as Privileged 2.
[4] Pl.'s Opp. 3.

and Stradley Ronon Stevens & Young, LLP, on drafts of the Term Sheet and Letter Agreement and drafts of a common interest agreement.[5] Eric Brooks, a Context principal, also personally retained attorneys from DLA Piper to seek business and legal advice regarding the transaction.[6] It is the substance of these communications by counsel that were shared between Titan and Context that are at dispute here.

By the end of July, 2009 the proposed transaction had failed to go forward. Freedom asserts that the proposal collapsed because Titan had not obtained the required financing. Titan counters that Freedom breached the agreement on July 22, 2009 when Freedom informed Titan that the market conditions had changed and the deal did not make financial sense any more. Titan subsequently filed this lawsuit, alleging breach of contract and seeking damages.

B. The Discovery Dispute

Freedom first filed a Motion to Compel Production of Documents, seeking the production of a number of documents that Titan had claimed as privileged. Titan has claimed that 345 of the documents on its privilege log are protected by the attorney-client privilege. Freedom seeks to compel the production of those

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[5] *Id.* at 4.
[6] Def.'s Mot. to Compel 3.

documents that revealed legal advice between Titan and Context, arguing that any privilege was waived by the disclosure of confidential attorney-client communications to third parties.

Titan argues that it did not waive the attorney-client privilege by sharing communications with its counsel with Context because of the partnership relationship between Titan and Context with respect to the Titan fund. Alternatively, Titan argues that it did not waive the attorney-client privilege by sharing confidential communications with Context, its counsel, or the DLA Piper attorneys because all were engaged in a common enterprise and, as such, the communications were protected by the common interest doctrine.

(a) Applicable Standard of Review

As a general rule, "parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action…."[7] The party asserting a privilege bears the burden of proving that it applies to the documents or communications in question.[8] Accordingly, a party who withholds "information otherwise discoverable… by claiming that it is privileged or subject to protection as trial preparation material… shall make the claim expressly and shall describe the nature of the documents, communications,

[7] Del. Super. Ct. Civ. R. 26(b)(1).
[8] *Moyer v. Moyer*, 602 A.2d 68, 72 (Del. 1992).

or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection."[9]

(b) The Attorney-Client Privilege

The attorney-client privilege protects from disclosure communications between a lawyer and a client. The party asserting the attorney-client privilege must show that "a communication was made (1) for the purpose of seeking, obtaining or delivering legal advice, (2) between privileged persons, and (3) that confidentiality was intended."[10] Such communications need not have been made "in anticipation of litigation."[11] One court explained, "the attorney-client privilege is properly invoked when 'the attorney is 'acting as a lawyer giving advice with respect to the legal implications of a proposed course of conduct.'"[12] The presence of a lawyer does not transform a non-privileged communication into a privileged one and likewise, an incidental request for business advice made in conjunction with a communication primarily soliciting legal advice will not destroy the privilege.[13]

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[9] Del. Super. Ct. Civ. R. 26(b)(5).
[10] *Rembrandt Technologies, L.P. v. Harris Corp.*, 2009 WL 402332, *5 (Del. Super. Feb. 12, 2009).
[11] *Id.*
[12] *Id.* at *6 (quoting *Hercules v. Exxon Corp.*, 434 F.Supp. 136, 147 (D.Del. 1977)).
[13] *Id.*

Titan first asserts that its communications with Context and their respective counsel are protected by the attorney-client privilege because of Context's role as a 50% general partner in the Titan fund. In support of their argument, Titan relies heavily on *Fitzgerald v. Cantor*,[14] which holds that a general partner is entitled to the advice of the partnership's counsel "when it had an attorney-client relationship with the partnership's counsel at the time the advice was requested."[15] Furthermore, Titan relies on *Fitzgerald*'s statement that "the attorney-client relationship can be established on the basis of a pre-existing relationship that would create a reasonable expectation on behalf of the general partner that the attorney was representing its interests, and reliance by the general partner upon that expectation."[16]

However, the record in the present case does not support a finding that Context had a reasonable expectation in the spring of 2009 that Titan's counsel was representing their interests. Context was not included in the limited partnership agreement formed for Titan. The common interest agreement provided to the Court, which expressed Titan and Context's intent that their communications remain confidential, was dated "as of" August 12, 2009, following the period of time for which Freedom now seeks documents. Titan is

[14] 1998 WL 781191 (Del. Ch. Oct. 28, 1998).
[15] *Id.* at *1.
[16] *Id.*

correct that the absence of a formal written agreement memorializing the partnership is not dispositive, but the absence of one significantly calls into question whether the business relationship had progressed to the point where the parties were even acting as such. If counsel wanted to protect these documents as privileged, they certainly would have appreciated the significance of formalizing the relationship between Titan and Context which has never occurred. Regardless, the Court finds that the record does not support a finding that the parties were regarded as partners during the period in question. Each had separate counsel which was being used to protect their interests, not only in how the Titan/Freedom transaction would be structured but the business relationship between Titan and Context. The interaction between Titan and Context was far from an established clearly articulated business arrangement and the agreement with Freedom was far from a done deal. Accordingly, Titan has not met its burden of proving that a sufficient partnership relationship existed between Context and Titan prior to July 24, 2009[17] and thus communications by or with counsel and shared with others are not protected on that basis.

[17] This is the date before which Freedom is seeking production.

(c) The Common Interest Doctrine

Titan's second argument is that the privilege was not waived because they are protected under the common interest doctrine, an extension of the attorney-client privilege that applies to parties engaged in a common enterprise. Freedom argues that the common interest privilege is inapplicable to the Titan/Context communications because they did not have identical legal interests at the time the communications were made and the communications were for business not legal reasons. The common interest privilege has been codified in the Delaware Rules of Evidence 502. The rule states in pertinent part:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client. . . (3) by the client or the client's representative or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another in a matter of common interest.[18]

In other words, the common interest privilege allows "separately represented clients sharing a common legal interest" to "communicate directly with one another regarding that shared interest."[19]

[18] Del. R. Evid. 502(b)(3)(2008).
[19] *Rembrandt*, 2009 WL 402332 at *8.

Freedom contends that the privilege does not apply here because Context and Titan did not have identical interests with respect to the Freedom/Titan transaction and, in fact, Context and Titan's interests may have been adverse during the period of the negotiations. However, this Court recently declared that "[e]vidence that the parties' legal interests are 'substantially similar' is sufficient to invoke the common interest doctrine."[20] The proper inquiry here is whether the common interest invoked by the party asserting the privilege is sufficiently legal rather than commercial. As a general rule, application of the common interest privilege is appropriate where it is clear that the parties were collaborating and sharing information in furtherance of a joint *legal* strategy or objective, rather than simply seeking legal advice with regard to a commercial transaction. Thus, for example, the *Rembrandt* court held that application of the privilege was appropriate where the asserted common legal interest involved "the enforcement and exploitation" of patents.[21] Similarly, the *American Legacy Foundation* court upheld the privilege in a case involving a non-profit organization whose mission

[20] *Id*. at *7. *See also American Legacy Foundation v. Lorillard Tobacco Co*., 2004 WL 2521289, *4 (Del. Ch. Nov. 3, 2004) (declining to apply a strict definition of "identical interests" in determining whether common legal interest exists); *In re Teleglobe Communications Corp*., 493 F.3d 345 (3d Cir. 2007) ("The Delaware courts seem not to have taken a position on whether the common legal interest must be identical, and we need not resolve the congruence-of-legal interests question here. For our purposes, it is sufficient to recognize that members of the community of interest must share at least a substantially similar legal interest.") *But see Corning Inc. v. SRU Biosystems, LLC*, 223 F.R.D. 189 (D.Del. 2004) ("[F]or a communication to be protected, the interests must be 'identical, not similar, and be legal, not solely commercial.'") (citing *In re Regents of the Univ. of Cal.*, 101 F.3d 1386 (Fed. Cir. 1996)).

[21] *Rembrandt,* 2009 WL 402332 at *6.

was to increase awareness about the dangers of tobacco use and its advertising agency, noting that it was reasonable for the plaintiff non-profit organization to believe that its advertisements could trigger a lawsuit and that its choice to hire an outside advertising agency "required [the nonprofit] to disclose certain privileged information to [its advertising agency] on a confidential basis in order to fulfill its mission."[22]

By contrast, courts have typically denied the privilege where it appears that the interests involved are primarily commercial in nature, or where the shared legal advice primarily pertains to advancing the common commercial interest. The district court in the Southern District of New York, applying Delaware law, denied the application of the common interest privilege, finding that "the negotiations between these two corporations [] reveal[ed] that [the] disclosures to [the third party] were made not in an effort to formulate a joint defense but rather to persuade" one party to invest in the other.[23] Similarly, in a case involving negotiations over letters of credit between a bank, an insurance company and a reinsurer, the court held that the common interest privilege did not shield communications shared among the bank, the insurer, and their respective counsel.[24] The court noted, "The existence of a 'legal' – rather than a commercial

[22] *American Legacy Foundation,* 2004 WL 2521289 at *3.
[23] *Corning*, 223 F.R.D. at *190.
[24] *Bank of America, N.A. v. Terra Nova Ins. Co.,* 211 F.Supp.2d 493 (S.D.N.Y. 2002).

venture […] is a critical component of the common interest doctrine," and concluded, "It is of no moment that the parties may have been developing a business deal that included as a component the desire to avoid litigation."[25] Of particular significance for this case, the *Bank of America* court declared that the "Common Interest/Joint Prosecution and Defense Agreement" between the bank and its insurer that was executed in 2000 served to highlight that there was no common legal interest present during the negotiations in 1999.

Titan has not met its burden of demonstrating a common *legal* interest between it and Context during the time period for which documents are sought. Titan argues that it shared a common legal interest with Context in the negotiations over the deal with Freedom and that the members of the deal team shared advice of counsel to "achieve their commercial objective."[26] However, a common commercial objective is not sufficient to extend the protection of the common interest doctrine. Similarly, Titan's argument that Titan and Context "shared a common legal interest in receiving legal advice on the issues concerning the transaction"[27] is insufficient. The present case can be distinguished from the situation in *Rembrandt*, where the commercial objective was inherently related to a legal strategy – namely, the exploitation and enforcement of patents . Here, on

[25] *Id.* at 497.
[26] Pl.'s Opp. 3.
[27] *Id.* at 6.

the other hand, Titan asserts no clear legal interest that is inherently related to its commercial objective other than an interest by both parties in receiving legal advice concerning the business transaction. Nothing in the record presented to the Court suggests that Titan and Context anticipated becoming co-plaintiffs or co-defendants at the time they were sharing legal advice concerning the proposed transaction between Titan and Freedom. In fact, there is nothing to suggest that Context could not have simply walked away from the transaction without any liability if it believed it no longer was in its interest to continue. Clearly any interest that Titan and Context shared related to their business interests and not a common legal interest. In other words, it was designed to further a commercial transaction and did not further a common legal strategy. The parties' interests in ensuring that the transaction was structured in a way that is legally appropriate is not sufficient to warrant the extension of the common interest privilege.

Nor can Titan demonstrate the existence of a common interest by pointing to the common interest agreement. This agreement appears to have been made after the conclusion of negotiations with Freedom and is dated "as of" August 12, 2009. Freedom seeks the production of documents from the period of April to July 24, 2009. The existence of a common interest agreement made effective August 12, 2009 suggests that there was no common legal interest present between

Titan and Context before that date. It is important to recognize that by the summer of 2009, the parties are represented by counsel from well regarded and respected law firms who would have appreciated the significance of the common interest agreement and the importance of its effective date. To argue after the fact that the Court should expand it beyond that previously agreed to by Titan is simply unsupportable. Accordingly, the Court finds that Titan has not met its burden of asserting that the common interest privilege applies to the withheld documents. Therefore documents that Titan has withheld on the basis of the common interest doctrine shall be provided to the Defendant by Monday, February 7, 2011.[28]

C. Summary Judgment

(a) Standard of Review

Defendant Freedom Mortgage has also filed a motion for summary judgment. A party is entitled to summary judgment where there are no genuine issues of material fact.[29] The moving party bears the burden of showing that there are no genuine issues of material fact so that he is entitled to judgment as a matter of law.[30] The Court must view all factual inferences in a light most favorable to the non-moving party.[31] Summary judgment will not be granted if it appears that

[28] Titan may retrieve from the Court the documents it provided for an *in camera* review regarding this motion.
[29] Del. Super. Ct. Civ. R. 56(c); *Wilmington Trust Co. v. Aetna,* 690 A.2d 914, 916 (Del. 1996).
[30] *Moore v. Sizemore*, 405 A.2d 679, 681 (Del. 1979).
[31] *Alabi v. DHL Airways, Inc.,* 583 A.2d 1358, 1361 (Del. 1990).

there is a material fact in dispute or that further inquiry into the facts would be appropriate.[32]

(b) Discussion

After reviewing the briefs, holding oral argument for nearly two hours during which a seventy-eight page power point presentation was given by the Defendant, the best characterization the Court can give to what was occurring in July and August of 2009 between the parties was a high-stakes poker game being played by the principals of Titan and Freedom, where the potential chips on the table equated to millions of dollars. On the one side of the table was Stan Middleman, President of Freedom, who appears to have decided by July 22, 2009 that the deal was too costly and no longer workable for Freedom and appears to have directed his staff to stop working to bring the agreement to a conclusion. On the other side of the table was William Peruzzi, President of Titan, who saw his "Kenny Rogers"[33] moment when his opponent appeared to have shown his cards right at the table and instead of counting his chips and walking away, he decided to go for the big payoff. Put in terms of this dispute, the question remains

[32] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. Super. 1962), *rev'd in part on proc. grounds and aff'd in part*, 208 A.2d 495 (1965).

[33] Kenny Rogers, The Gambler, The Gambler (United Artists 1978). "The Gambler" is the title track of Kenny Rogers' 1978 album The Gambler that won him the Grammy Award for best male country vocal performance in 1980. It is best known for its lyrics "You got to know when to hold 'em, know when to fold 'em, know when to walk away, know when to run, you never count your money, when you're sittin' at the table, there'll be time enough for countin', when the dealin's done."

whether Freedom breached the agreement by its July 22nd e-mail and was its subsequent conduct in dealing with Titan simply an effort to string Titan along until they finalized another deal with Texas Capital Bank. In other words was Freedom's conduct after July 22nd a good faith effort to try to proceed with the deal or simply a corporate fabrication of their true intentions? In contrast, questions also remain whether Titan's conduct after July 22nd was simply reasonable business efforts to attempt to salvage the deal; did such conduct amount to a repudiation of Freedom's alleged breach; or was it simply a calculated effort to maximize the potential damage claim?

Regardless of how one may characterize the actions taken in July and August of 2009, what is clear is the facts are anything but undisputed. Since the trial of this matter will be conducted before this judge and not a jury, it will not comment further on the arguments that were made as it will wait until it hears directly from the witnesses and accesses their credibility before reaching its decisions on the facts here. But it is safe to say that the foundation upon which the Defendant's summary judgment argument is built is the assertion that Titan ignored and did not rely upon Freedom's representations regarding their decision not to proceed under the agreement and that the subsequent conduct by the parties effectively amounted to a retraction of the breach by Freedom. It is from this

premise that Freedom jumps to the argument that Titan did not meet the required conditions of the term sheet. Freedom would like the Court to simply look beyond what occurred in the time frame just after the July 22nd e-mail and to proceed to the question whether Titan ever met its obligations under the agreement. But the Court believes until a decision is made whether Freedom has breached the contract in the first place and in effect relieved Titan of its obligation to perform under the agreement, it cannot move to the question of Titan's compliance. The facts surrounding the events in late July and August are simply too unsettled to support granting summary judgment and the motion is hereby denied. Trial will proceed as scheduled on February 21, 2011.

D. Trial

To assist counsel in scheduling their witnesses and presentation, the Court has established the following schedule for the trial:

Monday, February 21, 2011 - 10 a.m. - 5 p.m.

Tuesday, February 22, 2011 - 10 a.m. - 5 p.m.

Wednesday, February 23, 2011 - 10 a.m. - 5 p.m.

Thursday, February 24, 2011 - 9:00 a.m. - 5 p.m.

Friday, February 25, 2011 - No Trial

Monday, February 28, 2011 - 9:30 - 5 p.m.

Tuesday, March 1, 2011 - 10 a.m. to 4:30 p.m.

Wednesday, March 2, 2011 - 10 a.m. to 4:30 p.m.

Thursday, March 3, 2011 - 9:30 a.m. to 1:30 p.m.

Friday, March 4, 2011 - 9:30 a.m. to 1:00 p.m.

Taking reasonable morning and afternoon breaks and lunch out of the equation, each party will be given 22 hours to present their case and to examine witnesses. The Court's Case Manager will maintain a record of the time used and counsel will be advised of the time remaining at the end of each day.

E. Conclusion

For the reasons set forth above, the Defendant's Motion to Compel is Granted, and the Defendant's Motion for Summary Judgment is Denied.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.